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**Fixing Meanings in Global Governance?
'Respect' and 'Protect' in the UN Guiding Principles on Business and Human Rights**

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Abstract

This article uses 'snapshots', rather than the ongoing flows of diffusion/contestation typically emphasised by constructivists, in order to evaluate normative change. Its case is a high-profile Human Rights Council initiative: the UN Guiding Principles on Business and Human Rights (UNGPs). The UNGPs have successfully presented meanings as fixed, while actually stretching those meanings' boundaries. They re-conceptualise what it means to 'respect' and to 'protect' human rights. This is surprising given that these Principles were framed as a conservative exercise at mere clarification; and also under-noticed, due to the legal rather than conceptual focus of the existing critical literature. According to the UNGPs, to respect human rights, agents need to take costly positive action. Furthermore, 'protect' obligations come before 'respect'. These are significant innovations. On the other hand, two missed opportunities of the UNGPs are their thin harm-based foundation for respect obligations, and their state-centrism about who has duties to protect.

Keywords:

Business and human rights; global governance; norms; meanings; respect; protect; Guiding Principles; obligations

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Introduction

In a seminal book, Barnett and Finnemore have argued that fixing the meanings of terms, or at least attempting to do so, is one of the ways that international organizations can exercise power.¹ This article explores how the United Nations Guiding Principles on Business and Human Rights (UNGPs) constitute one such attempt. The UNGPs were formally endorsed by UN Human Rights Council in 2011, after having been developed since 2005 under the leadership of John Ruggie. This initiative has already had a direct policy impact. For example: at the domestic level, states' national action plans on business and human rights have already appeared in 21 countries (at the time of writing) across both the global North and South;² at the regional level, it impacted the re-drafting of EU directive 2014/95/EU on non-financial reporting;³ and at the international level, the OECD produced new guidance on human rights due diligence, which was agreed and adopted by 48 countries in 2018.⁴ The immediate context for the UNGPs' development was the abysmal failure of earlier global initiatives on business and human rights, especially the 2003 'UN Norms'⁵, to gain any meaningful traction outside of a narrow sphere of activists.⁶ It is exceedingly rare for the UN Human Rights Council to 'endorse' (as distinct from 'welcoming', 'considering', or 'noting', etc.) a text led by non-state experts: one which had not been negotiated by states themselves.⁷ One of the primary factors contributing to the ultimate endorsement of the UNGPs was how they framed themselves as a mere 'identification and clarification' of the human rights standards pertinent to global business that have been there all along, rather than as the creation of new international law.⁸ A key conceptual underpinning of the UNGPs is their separation between the state duty to 'protect' human rights and the corporate responsibility to 'respect' human rights.⁹ The conceptions of 'protect' and 'respect' within the UNGPs constitute the focal point of this article's analysis, as these are the axes around which the attempt to present normative meanings as fixed revolves.

This article argues that the UNGPs contain two significant areas of innovation. Firstly, in order to respect human rights, companies need to go beyond a purely negative duty not to interfere with peoples' lives; they also need to take potentially demanding, resource-intensive positive action, in order to discover and to mitigate potential harm. Secondly, the state duty to protect human rights comes first, and is constituted as independent of respect obligations: fundamental to human rights in and of itself. However, the article argues that the UNGPs also missed two significant opportunities where innovation would have been both possible and significant. Firstly, the notion of 'do no harm', even on the UNGPs' positive interpretation of what that requires, is still too thin a foundation for the meaning of a responsibility to respect human rights. Secondly, the UNGPs fail to problematise the state-centrism behind *who* has duties to protect in this area of practice.

¹ Barnett and Finnemore 2004.

² Cantú Rivera, forthcoming.

³ Neglia 2016.

⁴ Shavin 2019.

⁵ Weissbrodt and Kruger 2003.

⁶ Ruggie 2014, 6-7.

⁷ Ruggie 2013, xx.

⁸ Ruggie 2013, 82-83.

⁹ Ruggie 2008. A third and final pillar asserts that victims must be provided with access to 'remedy', taking both judicial and non-judicial forms, after instances of human rights violation.

Many scholars whose work has been labelled ‘conventional constructivism’¹⁰ view norms and their meanings as relatively settled once they have been established, and they go on to investigate the impact of these norms to generate change at different governance levels beyond the international.¹¹ This first approach would suit a research project that aimed to investigate whether the ideas of ‘protect’ and ‘respect’ in the UNGPs are actually powerful, for example: by tracking similarities in meaning as these Principles become diffused to the domestic level within states’ aforementioned national action plans. By contrast, critical norms researchers view contestation over the meaning of normative terms as ongoing and never truly settled.¹² They investigate the political processes that explain how and why meanings get established in one way rather than another at any given moment in time. This second approach would suit a research project that aimed to analyse and to draw conclusions from the political debates about normative meanings that preceded the UNGPs’ finally-agreed policy texts; and/or one that aimed to explain differences in the meanings of ‘protect’ and ‘respect’ within the UNGPs at the global level as compared to how they are subsequently contested, adapted and incorporated into regional, national and/or local policies. Although it keeps both of these approaches and their insights in the background, this article ultimately adopts neither as a primary method. This is because it asks a different kind of question. Instead of tracking *ongoing processes* of diffusion and/or contestation, this article takes *snapshots* of how ‘protect’ and ‘respect’ have been understood within the United Nations system, across different initiatives and across different time periods. This is done to establish that multiple possibilities of conceptual meaning exist—even though it might suit certain interests to present these meanings as fixed at any given moment—and to evaluate similarities and/or differences in these meanings from a normative perspective. Two particularly high-profile initiatives within the UN system that make extensive use of the concepts of ‘protect’ and ‘respect’, in relation to what we now call human rights—which have been selected for these reasons—are firstly the ‘respect, protect and fulfil’ tripartite framework (established in the 1980s and adopted formally within the UN system in 1999), and secondly the Geneva Conventions 1949.

Existing critical discussion of the UNGPs, from a combination of activists and legal academics, has centred mostly on the observation that the UNGPs are not legally binding. Due to perceived deficiencies with non-legally binding global-governance initiatives, they argue that the UNGPs should be replaced with a new instrument such as a treaty.¹³ These criticisms—by jumping straight to a potentially unhelpful binary between binding and voluntary governance forms—tend to overlook the significant, under-the-surface changes in normative meaning of core concepts of human rights obligation. But this is one of the key ways in which global governance initiatives such as the UNGPs can exercise power: defined not just as the ability to produce coercion, inducements and information, but also as the ability to ‘orient action and create social reality’.¹⁴ This article does ultimately raise criticisms of the UNGPs, but on their own terms: at the level of the normative meanings and concepts that they aim to present as fixed.

¹⁰ Hopf 1998.

¹¹ Finnemore and Sikkink 1998, Risse, Ropp, and Sikkink 1999.

¹² Wiener 2008, Krook and True 2010, Welsh 2013.

¹³ De Schutter 2016. See also Cassel 2018.

¹⁴ Barnett and Finnemore 2004, 6.

Respect and Protect in the UN Guiding Principles on Business and Human Rights

This section argues that the UNGPs contain under-noticed areas of innovation within their conceptions of obligations to ‘respect’ and to ‘protect’ human rights, particularly when compared to the earlier ‘respect, protect and fulfil’ framework for state obligations upon which they are explicitly based. The key differences are that the responsibility to ‘respect’ is conceptualised as going beyond negative duties; and the duty to ‘protect’ is conceived as fundamental to human rights in and of itself, rather than as derivative on someone else’s ‘respect’ obligation. The way that the innovations managed to make it through to the end of a policy initiative that explicitly framed itself as an attempt merely to identify and clarify existing principles and standards involved a process of *grafting* ideas familiar to those steeped in corporate law and tort law into human rights. In this way, conservative actors such as businesses and the states that constitute the UN Human Rights Council were reassured that nothing was changing, while meanwhile the conceptual meanings were doing the heavy lifting to drive the process forward toward something new. The excavation of this process, which occurs throughout the current section, anchors the next section’s argument that the UNGPs also contain significant and relevant missed opportunities that could have been achieved by following the same method.

Before going any further, it is important for readers first to understand how ‘protect’ and ‘respect’ obligations are defined within the UNGPs. Principles 1-10 outline the ‘state duty to protect’ human rights, and Principles 11-24 outline the ‘corporate responsibility to respect’ human rights.¹⁵ The explicit rationale for the inclusion of the state duty to protect human rights within the framework is that it ‘lies at the very core of the international human rights regime’.¹⁶ Principles 1 and 2 lay out the essential meaning of the state duty to *protect* human rights as it relates to business and human rights. States firstly need to take ‘appropriate steps to prevent, investigate, punish and redress’ human rights abuses by third parties.¹⁷ Secondly they need to ‘foster corporate cultures in which respecting human rights is an integral part of doing business’ through setting clear expectations for corporate conduct.¹⁸ Principle 3 sketches out the forms of regulatory, policy and enforcement mechanisms that are needed in order to operationalise the first two Principles in general, for all companies. Principles 4 to 7 highlight more specific sets of circumstances where the state’s protect duty comes into contact with business activity: state-owned enterprises, the privatization of public services, companies that enter into contracts with states, and companies in conflict zones. Principles 8 to 10 call for states to ensure domestic and international policy coherence with human rights principles, for example: when it comes to agreeing the terms of bilateral investment agreements; when it comes to states’ participation in multilateral institutions; or when it comes to the broad diffusion of consistently strong human rights standards across all governmental departments and ministries within a state (rather than keeping this process siloed within specific parts of the government thought to be especially responsible for protecting human rights). Next, the UNGPs define the corporate responsibility to *respect* human rights in Principles 11 to 14 as: (a) the responsibility of businesses of all sizes (b) not to infringe on all human rights, both civil-political and socio-economic/cultural, (c) either directly, through causing or contributing to harm to human rights, or (d) indirectly, through

¹⁵ Ruggie 2011.

¹⁶ Ruggie 2008, 4.

¹⁷ Ruggie 2011, 6.

¹⁸ Ruggie 2008, 10.

engaging in business relationships that are connected to human rights harm. Principles 15 to 22 specify *how* this is to occur: through the development of a policy commitment to human rights that is internally integrated within an organization, externally transparent, and effectively tracked in terms of its outcomes; through human rights ‘due diligence’, meaning that a business needs to take pro-active and sometimes costly steps to investigate whether it is or is not infringing on human rights; and through cooperative engagement with remediation processes in the aftermath of any harm that does occur. Principles 23 and 24 finally discuss how competing obligations should be prioritised: by permitting companies to prioritise human rights issues over other issues of legal compliance if conflicts should arise; and, within this, by guiding companies to address the most severe and/or time-sensitive human rights issues first.

Ruggie begins his scholarly discussion of the UNGPs’ conceptual framework by saying: ‘In international human rights discourse, states’ legal duties typically are differentiated according to the typology of “respect, protect and fulfil”’.¹⁹ This tripartite framework of human rights obligations is the explicit starting-point for the meanings of respect and protect within the UNGPs. The tripartite framework was generated in the 1980s in the context of UN expert work led by Asbjorn Eide on the right to food, and it was formally adopted within the UN system from 1999 in a number of ‘General Comments’ issued by the Committee on Economic, Social and Cultural Rights, beginning with General Comment 12 on the right to food.²⁰ Subsequent to this, it has entered rapidly into other aspects of human rights theory and practice, both within and outside of the UN system, to the point that it is now considered a settled part of international human rights law (IHRL) on the nature of state obligations.²¹ This tripartite framework defines the duty to ‘respect’ in terms of the obligation to do no harm to a human right through direct, detrimental action; it defines the duty to ‘protect’ in terms of the obligation of a third party, usually the state, to prevent and to react to human rights harms committed by others; and it defines the duty to ‘fulfil’ in terms of the obligation actually to provide people with (access to) the objects of their human rights. At the beginning of the 1980s, when the tripartite framework was first conceived, civil-political rights were thought of as negative (possible to secure by doing nothing), and socio-economic rights were thought of as positive (possible to secure only by going out of one’s way to do something).²² According to a popular narrative, this had stymied the human rights regime during the Cold War, due to the way that each category of rights seemed to map onto one side of an ideological divide between the USA and the USSR.²³ The framework’s primary purpose in this context was to move beyond this impasse by showing how *all* human rights are linked to *all three* kinds of duties.²⁴ The civil-political right to be free from torture (typically assumed to be negative), for example, can involve ‘fulfil’ obligations to allocate significant public resources in order to be secure: into professional training as well as into broad-based civic education. Conversely, the socio-economic right to education (typically assumed to be positive) can involve violations of ‘respect’ obligation by depriving a single person of education, even in a social context where public education is widely available. It is precisely by starting with and then

¹⁹ Ruggie 2013, 83.

²⁰ Eide et al. 1984, United Nations Committee on Economic, Social and Cultural Rights 1999. See also Shue 1980.

²¹ Bódig 2015.

²² This is the context to which Shue’s (1980) book *Basic Rights* is also a direct response.

²³ Macklem 2015.

²⁴ Koch 2005.

adapting such a widely diffused conceptual framework that gives initial force to the UNGPs' claim to be a conservative exercise at clarification.

The UNGPs' interpretation of the responsibility to respect starts off with the principle that individuals should not be deprived of their human rights through the harmful actions of others. At first glance, this seems to align directly with the definition of respect as 'do no harm' within the earlier 'respect, protect and fulfil' tripartite framework. However, it is significant that in explaining *how* companies need to act in order to meet this obligation, the two frameworks begin to diverge. In the UNGPs, it is not enough to do no harm simply by standing back, doing nothing and getting out of others' way. Instead, companies need to do due diligence. They need to be able to 'know and show' that their activities are not harmful.²⁵ In corporate culture, the concept of due diligence is understood as a process of doing adequate research prospectively to manage business risks. The UNGPs aim to consolidate an expansion of the object of this risk beyond shareholder value, to include risks to human rights.²⁶ However, as Bonnitcha and McCorquodale point out, due diligence is not simply a process of investigation that companies 'do'; it is also a legal standard of conduct.²⁷ To illustrate the latter: in a typical tort case, in order for a plaintiff to win, the plaintiff needs to show that the defendant was at fault, or in other words, that the defendant went out of his/her way to cause the harm. However, in certain circumstances, the law specifies that there is a different standard of absolute or strict liability: meaning that a specifiable agent will automatically be held responsible for any harm that befalls someone within his/her sphere of care, just because that harm happens.²⁸ If there is strict liability, then there is no need for a victim of harm to establish a clear causal link to something that the (strictly liable) actor did or did not actively do. All the victim needs to do is to establish that a particular actor meets the criteria specifying which agent is strictly liable. Due diligence can be understood as a third standard of conduct that falls *in between* strict liability and a standard conception of fault. In order not to be responsible according to a due diligence standard, the defendant needs to show that he/she acted prudently: that the harm was not reasonably foreseeable. According to a due-diligence standard, 'having done nothing' (not having actively gone out of one's way to act harmfully) is not an excuse. But nor is liability automatic just because harm happens. The actions and inactions leading up to the harm, the steps taken or not taken, the degree of foresight exercised or not exercised: these are all relevant to the attribution of responsibility. Due diligence therefore involves certain kinds of positive obligations, which are potentially costly to meet.

By introducing a due diligence standard, the UNGPs diverge from the 'respect, protect and fulfil' framework upon which they are supposedly based, in a way that is politically deeper than what is apparent on the surface. In the 1980s context of the inception of 'respect, protect and fulfil', the very *point* of the definition of 'respect' within that framework—in international-political terms—was to associate all human rights, including socio-economic rights, with *at least some purely negative* duties.²⁹ This was in order to make socio-economic rights, such as the rights to food, health and education, more palatable to those Western

²⁵ Scheper 2015.

²⁶ Ruggie 2013, 99.

²⁷ Bonnitcha and McCorquodale 2017.

²⁸ The differences between 'absolute' and 'strict' liability are not central to this article's argument. Bonnitcha and McCorquodale (2017), contrast due diligence with 'strict' liability.

²⁹ Karp, forthcoming.

liberals who—especially in a late Cold War ideological context—were sceptical about the levels of positive state action and interference in the lives of individuals potentially required by ‘protect’ and/or ‘fulfil’.³⁰ That these human rights, too, can be respected just by doing nothing made these easier to promote, in that context, as universal human rights. This is central rather than peripheral to the attempt to fix the meaning of ‘respect’ in that way, at that time. What is remarkable and under-appreciated about the UNGPs is that they present the due-diligence-based, positive-obligations interpretation of ‘respect’ as a settled consensus—indeed, as an interpretation and clarification of ‘respect, protect and fulfil’ itself—rather than as one side of a live and contentious debate: one that has required a lot of recent philosophical effort to try to bring liberals on board with the idea that doing no harm can involve duties to take costly positive action.³¹

The UNGPs also diverge conceptually from the ‘respect, protect and fulfil’ tripartite framework of state of obligations when it comes to their ‘protect’ pillar, and to the question of how ‘respect’ and ‘protect’ interrelate. In the standard tripartite framework of state obligations for human rights, ‘respect’ is the first pillar. But in the ‘protect, respect and remedy’ framework that underpins the UNGPs, ‘protect’ comes first. Which concept to put first in each framework was not a random or arbitrary stylistic choice. In ‘respect, protect and fulfil’, ‘respect’ obligations come across as fundamental to the entire human rights enterprise in a way that ‘protect’ and ‘fulfil’ are not. They perceived as the hardest, most justiciable and therefore most easily enforceable, kind of obligation. Indeed, the ‘violations approach’ to socio-economic rights that was so heavily emphasised (alongside the tripartite framework) in the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights aims to show that that socio-economic rights are just as important as civil-political rights because *they too* are associated with ‘respect’ obligations and therefore *they too* are justiciable and enforceable.³² Pogge has even gone as far as saying that human rights can only meaningfully be ‘violated’ by failing to respect, and that protect and fulfil obligations are (in his own words) ‘largely irrelevant’ to the concept of human rights and their violation.³³ These examples from both practice and theory illustrate that in the ‘respect, protect and fulfil’ framework, it is substantive rather than accidental that obligations to ‘respect’ human rights come first. It is only because and to the extent that these respect obligations will sometimes be violated that the ‘protect’ pillar comes into play at all. Protect obligations involve a third party—typically the state—coming to the rescue, to prevent and/or react to failures to meet ‘respect’ obligations. This model conceives ‘respect’ as being first, foremost and fundamental, reflecting a view that has become standard in law and philosophy. The UNGPs, by contrast, put ‘protect’ first. Once again, an analysis of the content shows that this is not only a matter of presentation, but also one of substance. The policy texts themselves say, explicitly, that the ‘state duty to protect’ comes first because it ‘lies at the very core of the international human rights regime’.³⁴ This is intended as a reference to the increasingly central role that direct protection has played in the actual practice of the international human rights system since the mid-1990s.³⁵ By emphasising the centrality of protection rather than respect obligations,

³⁰ Ibid. See also Eide, Oshaug, and Eide 1991.

³¹ Linklater 2006, Pogge 2007, Brincat 2013.

³² International Commission of Jurists, Urban Morgan Institute for Human Rights, and Centre for Human Rights of the Faculty of Law of Maastricht University 1998.

³³ Pogge 2011, 11.

³⁴ Ruggie 2008, 4.

³⁵ Forsythe 1995, 309.

the UNGPs have successfully presented as fixed and settled something that can actually be read as a significant challenge to usual way of presenting the legal and philosophical underpinning of human rights obligations.

The re-ordering of the pillars so that ‘protect’ comes first is especially significant for a further and deeper reason. Whereas the standard way of representing the relationship between obligations to respect and to protect human rights has made protect derivative on respect—in other words, ‘protect’ only matters (and becomes activated) because and to the extent that agents can be expected to fail to ‘respect’—the UNGPs make ‘protect’ and ‘respect’ independent of one another. Each is equally fundamental within in its own sphere of action. Companies have a responsibility to respect human rights even if states fail at their duty to protect. Moreover, states’ duties to protect are themselves independent of, and in many ways prior to, companies’ responsibility to respect, rather than the other way around. Principles 1 to 10 of the UNGPs underscore how states can fail to put the institutional structures in place that regulate, adjudicate, investigate and punish corporate human rights abuses. This failure creates the context that generates the need for businesses and the agents who act on their behalf need to think through how best to respect human rights, where the law on the matter is unclear, or where the law may even make demands on non-state actors in the opposite direction.³⁶ This flips the conceptual order of ‘protect’ and ‘respect’. Going deeper still: the focus on state regulation of non-state actors inherent in the meaning of ‘protect’ within the ‘respect, protect and fulfil’ tripartite framework focuses primarily on what Lukes called the ‘first face’ of power: the ability of states to set requirements, and openly to force other actors to comply.³⁷ The UNGPs go beyond this to recognise the significance of the states’ wielding of the ‘third face’ of power: the ability to set the structure and ideological context within which others decide.³⁸ To illustrate this point: Principle 8 refers to the way that governmental institutions ‘shape business practices’. The state duty protect involves the need to ‘foster corporate cultures in which respecting human rights is an integral part of doing business’. Rather than working with a model of *agents* who respect, in contrast to *institutions* that prevent and/or react to failures to do this (in order to protect)—a picture within which most of the meaningful agency resides in the former—the UNGPs pry open a space to interpret the social ontology of human rights violations in a different way. They conceive of the actors/actions involved in respecting (or failing to respect) human rights as themselves produced and shaped by a broader social, cultural and institutional context. In this light, public institutions can be viewed as constitutive of agency and action, rather than being merely responsive or preventative in relation to it. The responsibility for *that context* is part of the duty to protect. All of this illustrates that the UNGPs present ‘respect’ and ‘protect’ as independent of one another, and as (at least) equal in importance, rather than presenting protect as derivative upon another agent’s prior and more fundamental obligation to respect. When compared to the dominant meaning of human rights obligations in IHRL, and especially the ‘respect, protect and fulfil’ framework, this represents a significant and under-noticed innovation, with implications for the nature of human rights obligations that could go beyond the specific field of business and human rights.

This section has argued that the UNGPs’ interpretations of the ‘corporate responsibility to respect’ human rights and the ‘state duty to protect’ human rights contain

³⁶ Karp 2009.

³⁷ Lukes 2005. For examples of this in practice, see Neglia 2016.

³⁸ Lukes 2005.

important elements of innovation, despite having been presented as a mere identification and clarification of the existing human rights principles and standards that apply to companies and to states. 'Identification and clarification' can therefore be viewed as a political framing, designed to garner the support of typically conservative actors, rather than as an entirely sincere description of the method used to arrive at the policy. It is an example of a global attempt to exercise power by presenting meanings as *already* fixed, while at the same time, in actual fact, consolidating conceptual change. This raises the question of whether there were any missed opportunities, whereby a similar method could have been followed in order to achieve further relevant innovation. This is the question to which the next section turns.

Going Further: Respect and Protect in the Geneva Conventions

The UNGPs were successful at presenting the above innovations as mere 'identification and clarification', due to their method of grafting external (non-IHRL) standards from other cognate fields of practice into international human rights law. For example, the focus on the centrality of 'protect' as the core state obligation in the international human rights system is only a puzzle if one's focus is on the 'respect, protect and fulfil' international-legal framework, within which 'respect' is viewed as hardest and most justiciable. By contrast, the very same thing is completely intelligible if one's cultural context involves knowledge of how the direct protection of refugees, displaced persons, and other civilians has evolved within the United Nations system over time.³⁹ To take another example: corporate governance systems, such as those that require the conduct and transparent reporting of due diligence before investment, are explicitly presented as one of the 'building blocks' for a new business and human rights framework.⁴⁰ These have been grafted in, from outside of IHRL, into a discussion about what it means to respect human rights. Whereas Bonnitcha and McCorquodale, whose work was discussed above, *problematise* the fact that due diligence means one thing in tort law and something different in corporate governance, perhaps this is, instead, a useful fudge.⁴¹ The idea of human rights due diligence brings a concept that is familiar, in different ways, to both lawyers and managers into the same 'responsibility to respect' pillar. Since due diligence *both* as a legal standard of conduct *and also* as a practice of managing business risk is foreign to the existing meaning and purpose of 'respect' (within the existing tripartite framework of state human rights obligations), this enables the UNGPs to consolidate a significant conceptual innovation. Both of these examples highlight the method of grafting standards from other cognate practices and cultures into the international human rights system's framework of obligations, in order to frame conceptual meanings as fixed while those same meanings' boundaries are actually being stretched.

The rest of this section highlights how this same process could have been followed in order to push the boundaries further in two relevant areas: firstly, overcoming the thinness of the do-no-harm foundation of respect obligations; and secondly, overcoming the state-centrism of protect obligations. These represent missed opportunities. In order to demonstrate this, this section uncovers and interprets the meaning of respect and protect obligations in the Geneva Conventions 1949, which underpin much of contemporary international humanitarian law. Although it is important to point out that international

³⁹ Deng 1995, Forsythe 1995, Deng et al. 1996, McLoughlin 2016.

⁴⁰ Ruggie 2014, 9.

⁴¹ Bonnitcha and McCorquodale 2017.

humanitarian law is distinct from international human rights law, so are tort law and corporate governance: both of which provided source material that the UNGPs successfully grafted into human rights in order to consolidate conceptual innovations.

The language of obligations to respect and to protect is prevalent within the Geneva Conventions. For example, Article 12 of the First Geneva Convention says: 'Members of the armed forces... who are wounded or sick shall be *respected* and *protected* in all circumstances'.⁴² Article 12 of the Second Geneva Convention uses similar language about those at sea. The Fourth Geneva Convention, which focuses on obligations to civilians in armed conflict, says that 'the wounded and sick, as well as the infirm, and expected mothers, shall be the object of particular *protection* and *respect*' (Article 16); and that 'civilian hospitals... shall at all times be *respected* and *protected* by the Parties to the conflict' (Article 18).⁴³ A more detailed analysis will now determine what these terms mean, in the context in which they are being used: focused on conceptual similarities and differences with both the 'respect, protect and fulfil' framework and also the UNGPs. This enables, as a next step, the article to argue that there is indeed material that usefully could have been grafted in to the UNGPs' contemporary re-framing of these concepts, for the purpose of addressing human rights challenges of the present.

The term 'protect', including its various derivatives, appears over 400 times in the Geneva Conventions, which make particularly numerous references to both 'protecting powers' and 'protected persons'.⁴⁴ Neither term is explicitly defined, so their meaning needs to be interpreted. 'Protecting power' refers to a state that, in the context of war, is exercising de facto political authority over individuals—for example, those who have been captured or whose countries are being occupied—but doing so outside of that state's legally recognised sovereignty territory. A 'protected person' is a sick or wounded soldier, or a civilian who is not a national of the 'protecting' state, who finds him/herself under the scope of protecting power's *political* rule, without being a legitimate *military* target. Consider this quotation: 'At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled' (First Geneva Convention, Article 15).⁴⁵ Protection from external violence has been widely understood since Hobbes wrote *Leviathan* as the basic obligation that the state owes to individuals.⁴⁶ The Geneva Conventions extend this beyond the usual relationship between states and their own populations, to include non-nationals who find themselves (as a result of international conflict) within the scope of a 'protecting power's' rule, but who cannot be legitimately killed. In terms of obligations to 'respect', consider a few quotations. Regarding prisoners of war:

Prisoners of war are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as

⁴² International Committee of the Red Cross 2010, emphasis added.

⁴³ Ibid., emphasis added.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Hobbes 1996/1651.

favourable as that granted to men. (Third Geneva Convention, Article 14).⁴⁷

While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment (Third Geneva Convention, Article 38).⁴⁸

Regarding protected civilians:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity'. (Fourth Geneva Convention, Article 27).⁴⁹

The above quotations show that in the Geneva Conventions, the responsibility to respect goes beyond 'do no harm'—even according to a due diligence standard—as its foundation. Instead, aside from requiring the physical protection of individuals, the Geneva Conventions also require that they be treated as fully human, even if this requires demanding positive action. 'Protect' is the basic obligation that co-relates to personal safety, and 'respect' goes beyond this to include something richer and deeper that is not fully captured by the notion of harm. It brings the notion of the responsibility to respect human rights closer to a Levinas-inspired account of responding to the 'call of the other'.⁵⁰ The text explicitly includes recognition of different needs based on gender, and today we would add sexual orientation, race, ethnicity and disability. Also inherent within the text is the need to see—and to act in accordance with seeing—the rich sets of intellectual, educational, recreational, social and personal pursuits that are parts of peoples' selves: rather than treating them more thinly as mere workers and/or consumers, whose bodies and interests can be defined in a binary way as either 'harmed' or 'unharmed'. These are clearly ways in which businesses can impact on human rights in today's world. But they are not necessarily possible to capture purely through a paradigm of due diligence—meaning doing research to mitigate risk—focused on the need not to cause foreseeable and quantifiable harm.⁵¹ An attempt to graft the meaning of the responsibility to 'respect' from the Geneva Conventions into contemporary business and human rights could enable a thicker and richer notion of what it means to respect people: one which is also more consistent with most ordinary-language understandings of what it means to 'respect' others.

It is also striking that in the Geneva Conventions, the question of protection is prior to the question of respect. If, because, and to the extent that a state finds itself in the role of 'protecting power'—over people who would not normally be citizens or residents of that state but who in reality have fallen under the scope of that state's de facto authority—then that

⁴⁷ International Committee of the Red Cross 2010.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Mitoma and Bystrom 2015, 33.

⁵¹ See also Coleman 2015.

state finds itself in a position of needing to consider which ethical, political and/or legal obligations it has toward those people: despite the lack of consent to be governed or legitimate social contract. However, rather than defining duty-bearers as ‘states’—as the UNGPs do when they call their first pillar the ‘state duty to protect’—the Geneva Conventions use the language of ‘protecting power’. The term ‘protecting power’ is a *sense* (a description that can be used to pick out something or someone), which is widely understood to pick out states as its *reference* (that ‘something’ or ‘someone’ itself).⁵² By following the ‘grafting’ process, the UNGPs could have attempted to followed a similar practice by incorporating a sense in order to define duty-bearers under the ‘duty to protect’ pillar, rather relying solely on a reference such as ‘state’ (for example: ‘the duty of public authorities to protect’). This represents another missed opportunity to innovate. Despite opening up thought about companies’ ‘respect’ obligations, the UNGPs are entirely and unapologetically state-centric when it comes to the question of who has duties to ‘protect’. Some companies—not many or most, but some—can find themselves in a role that is broadly analogous to the Geneva Conventions’ description of a ‘protecting power’. They exercise de facto political and social authority over residents of a community, in a way that is not necessarily legitimate, and in a way that lacks the meaningful consent of the governed.⁵³ Indeed, the idea that private actors can wield public authority, as well as both structural and protective power, has been a central theme of global-governance literature since the widespread uptake of the field.⁵⁴ These dynamics persist in reality despite the normative objections and activist resistance that can be generated against them. The UN Norms, the failure of which generated the context for Ruggie’s appointment, had attempted to place the same human rights obligations on *all* businesses, within their spheres of influence, as on states. The worry expressed at that time, contributing to that initiative’s failure, was that this would lead states with weaker empirical governance capabilities to pass responsibility on to companies when human rights violations occurred.⁵⁵ However, the UNGPs’ rigid state-centrism about who bears the duty to protect arguably swings the pendulum too far back in the other direction. It is not necessary to say that *all* business have duties to protect human rights, which is the mistake made by the UN Norms. Nor is it even necessary to spell out in black-and-white, by naming them as a reference, that *some businesses* have the duty to protect human rights: which would have been inconsistent with an ability to frame the pillar as mere identification and clarification. However, it could have been possible within the ‘grafting’ method identified above to draw from the example of the Geneva Conventions, in order to adopt a more flexible language *as a sense* in order to describe who has duties to protect human rights—such as spelling out that any actor with a public and authoritative role can have obligations under the ‘state duty to protect’ pillar—alongside naming all states as referents. This is significant because the duty to protect comes with a strict-liability standard of conduct, rather than a standard based either on due diligence or on entirely negative duties. In other words, adapting this aspect of the meaning of ‘protect’ from the Geneva Conventions into business and human rights can help to clarify any circumstances in which non-state actors such as businesses have taken on

⁵² Frege 1948. This focus on the sense rather than on its presumed reference has opened up the possibility of a subsequent discussion within international humanitarian law about the extension of its obligations to armed non-state actors, without weakening the urgency of the obligations that fall on states. For examples, see: Meron 2000, Clapham 2006.

⁵³ Abrahamsen and Williams 2011.

⁵⁴ Rosenau 1995, Cutler 2003, Kobrin 2009, Orford 2011. See also Strange 1988.

⁵⁵ Karp 2014, 32.

a role that makes them automatically liable for any human rights harms that occur, regardless of whether or not they can ‘know and show’ that they took reasonable steps to foresee harm.

Conclusion

Ultimately, and in nuanced ways, this article’s analysis of a recent, high-profile UN Human Rights Council initiative both rejects and supports the thesis that conceptual meanings in global governance can be fixed at the international level, as way of exercising power. On the one hand, a comparison of snapshots at different points in time—rather than the ongoing flows of contestation typically emphasised by critical norms researchers—and across different yet cognate policy initiatives, clearly illustrates a lack of long-term permanence. Meanings that seem to have been successfully fixed in the short term can and do change. On the other hand, a close analysis of the UNGPs reveals their attempt to *frame* meanings as fixed—as longer-standing and wider-ranging than they really are—in order to consolidate and to precipitate conceptual change. This framing was accepted by its intended audience of normally-conservative actors, who thought that they had only signed up for an attempt to clarify existing standards. Nietzsche once characterised normative meanings as like a spider’s web used by the weak to constrain the powerful: a description that will resonate with many conventional constructivists.⁵⁶ However, this article’s analysis reveals a different dynamic. *Various* powerful actors are engaging *with one another* over normative meanings, in a bid both to represent and to claim authority over other subordinate actors.⁵⁷ This double-edged conclusion about the extent to which international organizations can exercise power by fixing meanings constitutes a template that can be adapted by other scholars, in order to look for similar dynamics in other areas of international public policy. It is true that international institutions can exercise power by fixing the conceptual meanings of normative terms, and also true that these meanings, though presented as settled, are rarely truly fixed.

Beyond this more general conclusion, here are three specific contributions of this article’s analysis for human rights theory and practice. Firstly, the meaning of the responsibility to ‘respect’ human rights is defined by the UNGPs as going beyond negative duties not to interfere with others. The due-diligence standard means that in order to respect human rights, agents need to take active, costly, pro-active steps, to investigate whether their activities are harmful. This focus on positive obligations differs from the more exclusively negative meaning and purpose of ‘respect’ within the ‘respect, protect and fulfil’ framework of state obligations. This can be taken up by practitioners and applied to human rights issues beyond the specific area of business. Secondly, the article thinks about the social ontology of human rights violations in a different way. Rather than the standard model of agents who violate and institutions that prevent and respond, this article’s argument sees public institutions as constituting a deeper social and cultural context within which agents’ action happens. Thirdly, the article highlighted missed opportunities within the UNGPs that can be target of future research and action: thinking through whether actors other than sovereign states should have duties to ‘protect’ human rights in international public policy; and (drawing from the Geneva Conventions 1949) thinking through how the world’s understanding of the nature of human rights obligations can move beyond a particular brand of ‘get the state out

⁵⁶ Nietzsche (1996/1887) was ‘disgusted’ by this, whereas Shue’s (1980, 18) evaluation of the same thing is more positive.

⁵⁷ Sending 2015.

of the way' liberalism that is no longer as politically salient as it was during the Cold War's final decade.

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